Kirkhill Rubber Company, Petitioner *and* United Rubber, Cork, Linoleum and Plastic Workers of America, AFL–CIO. Case 21–UC–356

February 28, 1992

DECISION ON REVIEW AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On August 23, 1991, the Regional Director for Region 21 issued a Decision and Order in which she dismissed the Employer-Petitioner's unit clarification petition because it was filed during the certification year. The Employer filed a timely request for review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has duly considered this matter and has decided to grant review, reverse the Regional Director's dismissal, and remand the case to the Regional Director for further processing.

On June 14, 1991, the Regional Director approved a Stipulated Election Agreement in which the parties agreed to a unit of production and maintenance employees, truck drivers, and shipping and receiving employees, excluding, inter alia, supervisors as defined in the Act. Prior to the election, the Employer provided an *Excelsior*[1] list that included the names of 26 leadpersons. At the election, the names of the 26 leadpersons remained on the voting eligibility list and each voted an unchallenged ballot.

On July 8, 1991, the Board certified the Union as the collective-bargaining representative of the unit employees. On August 1, the Employer filed a unit clarification petition seeking to clarify the unit by having the Board determine whether the 26 leadpersons are supervisors within the meaning of Section 2(11) of the Act. The Regional Director dismissed the unit clarification petition, noting the Board's general rule mandating the dismissal of representation petitions filed during the certification year. Based on the Board's majority decision in *Firestone Tire & Rubber Co.*, 185 NLRB 63 (1970), the Regional Director concluded that the certification year rule applied to the instant unit clarification petition. For the reasons that follow, we disagree.

The Board's certification year rule was intended to effectuate the policy of affording the employer and the union a full opportunity to arrive at an agreement within the certification year, which the Board has concluded is the period during which a certified union's status as statutory bargaining representative cannot be challenged. *Ray Brooks v. NLRB*, 348 U.S. 96, 103 (1954); *Centr-O-Cast & Engineering Co.*, 100 NLRB 1507, 1508 (1952). The Board dismisses representation petitions filed during the certification year, whether they be initiated by union, employer, or employee, to provide stability and peace in the bargaining process by affording the employer and the union a full opportunity to achieve a collective-bargaining agreement.

A unit clarification petition filed during the certification year, however, does not necessarily infringe on a union's representative status, nor does it detract from the bargaining that is to take place during that year. Indeed, it is not unusual for the Board to leave unresolved the status of employees who had voted under challenge during the election, but whose status was not determinative of the election results. In such circumstances, where the union receives a majority of the ballots cast, the Board will certify the union. If the parties cannot thereafter resolve the status of the nondeterminative challenged voters, the Board will process a unit clarification petition to determine the placement or status of the contested individuals.[2] Accordingly, the Board's processing of a unit clarification petition during the certification year is not inconsistent with its policy of barring representation petitions before the certification year has expired.

We do not find that *Firestone Tire & Rubber Co.*, supra, relied on by the Regional Director, is controlling here. In *Firestone*, the petitioner sought to consolidate two units by adding a recently certified firemen unit to an uncertified production and maintenance unit, either without or after a Board-conducted election among the firemen to determine their unit preference. In dismissing the unit clarification petition, the Board majority held that it would apply the *Centr-O-Cast* rule requiring the dismissal of a representation petition filed during the certification year.[3]

The obvious result of clarifying the unit in *Firestone* would have been the obliteration of the certified unit by ignoring the unit employees' recent vote to establish the separate unit. In the instant case, the Employer does not seek to vitiate the effect of the unit certification by merging two units or otherwise to force the employees in the certified unit to be represented in another unit. Rather, the Employer seeks to clarify the unit so that it consists only of those employees actually

[1] *Excelsior Underwear*, 156 NLRB 1236 (1966).

[2] See, e.g., *Niagara University*, 227 NLRB 313 (1976) (Board clarified unit during certification year to include four challenged voters); *D'Youville College*, 225 NLRB 792 (1976) (Board clarified unit during certification year to include four challenged voters); *Belo Broadcasting Corp.*, 225 NLRB 253 (1976) (Board clarified unit during certification year to include two challenged voters).

[3] Two Board members rested the dismissal on other grounds as well. They believed that, absent a question concerning representation or a clear showing that as a result of changed conditions the employees composing existing units have become so merged into a single overall unit as to make their continued maintenance in separate units inappropriate, the merger of established units is a matter which, under the statutory scheme, is to be left for voluntary bargaining by the parties.

covered by the unit description to which the parties stipulated.[4] We do not read the Board's finding in *Firestone* that the unit clarification petition there was untimely to preclude the processing of any and all unit clarification petitions filed during the certification year. In any event, because we believe that the *Centr-O-Cast* rule is limited in its application to representation petitions filed during the certification year that challenge the majority status of an incumbent certified representative, we would not apply it to unit clarification petitions that look ''toward the continuation of the collective-bargaining relationship'' that exists between the certified employee representative and the employer. For these reasons, we order that the instant petition be remanded to the Regional Director for further processing.[5]

[4] The language of the Stipulated Election Agreement does not specifically refer to leadpersons and is therefore not necessarily determinative of their status. The stipulated unit does, however, exclude ''supervisors as defined in the Act.'' Thus, to exclude the leadpersons now the Employer must demonstrate they were, in fact, statutory supervisors at the time of the stipulation or that, since the stipulation, their functions have changed to a degree justifying their exclusion now. *McAlester General Hospital*, 233 NLRB 589 fn. 1 (1977).

We find no merit to the Regional Director's suggestion that the Employer acquiesced to the inclusion of the leadpersons in the unit by placing their names on the *Excelsior* list and allowing them to vote without challenge. The placement of an employee's name on the *Excelsior* list is not determinative of that employee's status. Cf. *NLRB v. Emro Marketing Co.*, 768 F.2d 151, 157–158 (7th Cir. 1985); *Cavanaugh Lakeview Farms*, 302 NLRB 921 (1991).

[5] See dissenting opinion in *Firestone*, supra at 95. We overrule *Firestone* to the extent that the decision there is inconsistent with the instant decision in that it requires the dismissal of any unit clarification petition filed during the certification year.